

DECISION



19316 *Pellet*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-200358

DATE: September 1, 1981

MATTER OF: EDMAC Associates, Inc.

DIGEST:

1. Protest against the placement of an order under a Basic Ordering Agreement (BOA) is denied. The record indicates that the items ordered were urgently needed and the agency reasonably determined that the BOA contractor was the only firm qualified at the time the order was issued for waiver of first article testing requirements.
2. Protest against proposed agency use of a Basic Ordering Agreement is dismissed as academic because the requirements have been solicited competitively, first article testing has been waived for the protester, and the protester has competed.

EDMAC Associates, Inc. (EDMAC), protests the November 1980 order by the Navy Aviation Supply Office of Tele-Dynamics Division, AMBAC Industries Inc. (Tele-Dynamics), AN/AKT-22(V)(3) telemetry data transmitting set equipment, including transmitter-multiplexers and antennas, under Basic Ordering Agreement (BOA) No. N00104-76-A-0358. EDMAC contends the order and any future order constitute sole-source procurements which violate Defense Acquisition Regulation (DAR) § 1-304.2(a) (1976 ed.) because the protester is a qualified source and the Navy agreed with EDMAC that there would be competition.

The protest is denied in part and dismissed in part.

The equipment is for a Naval Air Systems Command (NAVAIR) helicopter avionics improvement program. Phase I of the program updates the transmitting equipment to a version 3 (V-3) configuration. The Navy is acquiring the transmitter-multiplexers and the antennas for 51 helicopters currently equipped with an earlier

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version of the transmitting set. Installation of the components was to begin the first quarter of 1981, and phase I of the program is to be completed by mid-1983.

The equipment is made in accordance with a military specification and a Tele-Dynamics drawing, and the agency's requirements were certified as suitable for formally advertised procurement. However, the Navy estimated manufacturing leadtime of 600 days for a new supplier to complete first article testing, and 270 days for a contractor which had already passed first article tests. The contracting agency concluded that the delay required to qualify a new supplier would not meet the avionics improvement program schedule. Consequently, the Navy decided to acquire the equipment from Tele-Dynamics, the only prior producer of the equipment, which did not have to complete first article testing. An order for 27 of the items (approximately half the agency's requirements) was placed under the BOA pursuant to a determination and findings that it was impracticable to obtain competition, citing 10 U.S.C. § 2304(a)(10) (1976) and DAR § 3-210.2(i) (1976 ed.).

EDMAC contends that it is qualified to supply the equipment because it was awarded a Navy contract in 1979 for version 4 (V-4) transmitting sets. However, due to problems not relevant here, EDMAC had not completed first article testing at the time the order was issued to Tele-Dynamics. The protester did not successfully complete all first article tests for V-4 equipment until May 1981.

EDMAC also argues that waiver of first article testing for Tele-Dynamics was improper essentially because the Tele-Dynamics equipment only met a superseded specification. Further, EDMAC contends that under the contracting activity's standard operating procedures, waiver may not be granted if, as here, the prior producer has been out of production more than a year.

The contracting activity is unaware of any agreement with EDMAC to compete the requirements in question or of any agency operating procedure which precludes waiver of first article testing merely because a prior producer has been out of production

for more than a year. Although in some instances waiver would not be granted under such circumstances, the Navy explains that eligibility for waiver of first article testing is always considered on a case-by-case basis. NAVAIR advised the contracting officer that Tele-Dynamics could furnish a product satisfactory for service use.

Tele-Dynamics states that it was granted first article approval by NAVAIR in 1975, that it has been in continuous production of AN/AKT-22V equipment since 1975, and that the specification for the equipment has not changed except to require performance of environmental tests on all equipment instead of the sampling procedure originally specified.

On the basis of the information provided by Tele-Dynamics and NAVAIR, the contracting officer is satisfied that waiver of first article testing requirements for Tele-Dynamics was appropriate.

Our Office has consistently held that the contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with specifications. B-166570, June 16, 1969. Therefore, an agency's decision to waive first article testing will not be questioned unless the waiver is clearly shown to be arbitrary or capricious. Moreover, DAR § 1-1903(a) (1976 ed.) specifically provides that the Government may waive first article approval requirements for a prior producer which has previously furnished acceptable supplies similar to those required. Advani Engineering Company, B-192256, November 14, 1978, 78-2 CPD 344. Contrary to the protester's assertions, the Navy states that Tele-Dynamics completed first article testing and has supplied acceptable transmitting equipment. Further, the record shows that the firm has been in continuous production of the equipment since 1977. EDMAC, therefore, has not shown that the Navy's decision to waive testing requirements for the order placed with Tele-Dynamics was without a reasonable basis.

Placement of a delivery order under a BOA is proper only if the circumstances justify a sole-source

procurement. RAM Enterprises, Inc., B-198681, October 14, 1980, 80-2 CPD 274; T. M. Systems, Inc., B-196170, April 8, 1980, 80-1 CPD 261. Our Office has recognized that the time of delivery can become controlling in urgent procurements, and we have not objected to a sole-source award to the only offeror qualifying for waiver of first article testing when such a waiver is essential to the fulfillment of required delivery schedules. T. M. Systems, Inc., supra; Modular Devices, Inc., B-182288, August 20, 1975, 75-2 CPD 119.

Because EDMAC did not qualify for waiver of first article testing, Tele-Dynamics did qualify, and the record provides no basis to question the urgency of the procurement, we believe that the Navy acted reasonably in placing the order under the BOA.

Although the Navy initially indicated its intention to acquire the remainder of its transmitting component requirements from Tele-Dynamics under the BOA, and EDMAC protested this, the agency subsequently issued separate solicitations on May 21, 1981, for the remaining 25 antennas and transmitter-multiplexers. First article testing was waived for EDMAC on the basis of its successful completion of first article testing for V-4 equipment in May 1981. EDMAC submitted proposals in response to the solicitations by the June 10, 1981, closing date. No awards have been made. As a result, EDMAC's protest with regard to these requirements is academic. See Lanier Business Products, Inc., et al., B-192432, February 9, 1979, 79-1 CPD 88; Alan Scott Industries, B-192250, September 12, 1978, 78-2 CPD 193.

The protest is denied as to the order placed with Tele-Dynamics and dismissed with respect to the Navy's ongoing procurements.


Acting Comptroller General
of the United States